

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CAMPAC ASSOCIATES, INC.	:	DETERMINATION
	:	DTA NO. 810730
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Campac Associates, Inc., 17911 Mitchell Avenue, Irvine, California 92714, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On June 21, 1993 and July 8, 1993, respectively, petitioner, by Thomas D. Kearns, Esq., and the Division of Taxation, by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel), agreed to have the controversy determined on submission without hearing. All briefs and documentation were submitted by November 19, 1993. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation should have been precluded from assessing Campac Associates, Inc. gains tax on its purchase of a controlling interest in Campac Associates from Campeau Corporation by reason of the three-year statute of limitations imposed by Tax Law § 1444.3.

II. Whether the Division of Taxation should be estopped from imposing gains tax to prevent a "manifest injustice" from occurring herein.

III. Whether penalty, interest penalty and interest should be abated, consistent with Tax Law § 1446(former [2][a]), in effect on the date of the transfer, September 1, 1983.

FINDINGS OF FACT

The parties entered into a stipulation of facts which has been incorporated into Findings

of Fact "1" through "19". The only modifications made to said stipulated facts were clarifications added to reflect additional information in the record. Following the stipulated facts are additional Findings of Fact.

On or about September 1, 1983, Campeau Corporation (U.S.) Inc. (now known as Federated Stores, Inc., hereinafter "Federated") sold a certain 60% partnership interest in Campac Associates to petitioner, Campac Associates, Inc. (the "Prudent transaction"). Campac Associates owned 99.9% of Prudent Fleetwood Properties ("Prudent"), a New York limited partnership. On October 5, 1990, the Division of Taxation ("Division") gave the Prudent transaction the Audit Registration Number of 101039E80024.

Federated and petitioner failed to file the appropriate returns under Article 31-B of the Tax Law ("gains tax") prior to the closing of the Prudent transaction.

Federated and petitioner failed to pay the New York real property transfer gains tax on the Prudent transaction.

Prudent was the sponsor of a cooperative offering plan for property known as Fleetwood Park Yonkers, New York.

The cooperative property is located at 754-800 Bronx River Road, Yonkers, New York.

Commencing in July 1983, petitioner, as a general partner of Prudent, began correspondence with the Division concerning the gains tax due on the sale of cooperative units. Petitioner paid gains tax on the sale of the units commencing in May 1985, using the consideration paid to Federated as part of the original purchase price to calculate the gains tax payable on the sale of the units.

By letter dated May 23, 1985 to Marsha Sorin, an employee of the Division, petitioner's accountants outlined the Prudent transaction.

On March 11, 1987, James P. Thomas, a tax technician employed by the Division, wrote to Prudent advising it of its possible gains tax liability for the Prudent transaction.

Following petitioner's receipt of the letter described in paragraph "8" above, through January 24, 1992, the date of the issuance of the Notice of Determination in issue, petitioner,

through its representatives, met with the Division on several occasions to review and discuss the Prudent transaction.

Petitioner's representatives provided the Division's auditors with the name, address and telephone number of Federated.

In January 1990, Federated filed for protection from creditors under the Federal bankruptcy laws.

On January 10, 1992, the United States Bankruptcy Court for the Southern District of Ohio issued an order confirming a plan of reorganization and fixing deadlines for filing certain claims.

On June 7, 1991, counsel to petitioner wrote to the Division's auditor urging the State to file a claim in the bankruptcy, even though the deadline for such claims expired in August of 1990.

The Division never filed a gains tax claim for the Prudent transaction in the Federated bankruptcy.

On June 3, 1993, the Division issued a Notice of Determination to Federated for the gains tax due on the Prudent transaction.

At the time of the Prudent transaction, the gains tax law did not permit the imposition of penalty or interest penalty against transferees.

On January 24, 1992, the Division issued a Notice of Determination to petitioner for the gains tax due on the Prudent transaction (Notice Number L-005223942-4) in the sum of \$243,250.00, plus penalty and interest, for a total of \$653,589.62.

On April 22, 1992, petitioner filed a petition to Notice Number L-005223942-4.

The petition was acknowledged by the Division of Tax Appeals on April 29, 1992.

The Division filed an answer to the petition on May 11, 1992.

On June 16, 1983, the Division received transferor and transferee questionnaires with regard to a transfer of title between Prudent Fleetwood Properties ("transferor") and Fleetwood Tenants Corp. ("transferee") which occurred on July 14, 1983. The transferor questionnaire

stated transferor's attorney as Ronald Klempner, Esq., of the firm of Kassel, Hoffman, Neuwirth & Geiger, New York City. An exemption was claimed on the ground that the transfer was pursuant to a contract of sale entered into prior to the enactment of the gains tax law.

On November 15, 1983, Mr. Klempner wrote to the Division requesting a second extension of time to "make the computations and elections" required by the Division with respect to computation of consideration and original purchase price for condominium/cooperative plans sponsored by Prudent Netherland Properties and Prudent Fleetwood Properties.

By letter dated December 15, 1983, Mr. Klempner again requested an extension to perform the required computations and elections. Mr. Klempner explained that the delay was due, in part, to the fact that Campac Associates, Inc., the general partner of the sponsor, had only recently acquired the books and records of the operations of the properties. There was no mention in any of these letters that Campac Associates, Inc. had acquired a controlling interest in Prudent Fleetwood Properties.

A year and a half later, in response to an inquiry by an auditor of the Division, by letter dated May 23, 1985 (referred to above in Finding of Fact "8"), the accounting firm of Kenneth Leventhal & Company outlined the transactions which occurred in the acquisition of Netherland Gardens and Fleetwood Park apartment complexes including the cooperative conversions of those complexes and the calculation of original purchase price ("OPP"). The salient portions of that letter are as follows:

"The following summarizes the changes in ownership of the partnerships known as Prudent Fleetwood Properties Company and Prudent Netherland Properties Company from December 10, 1979 through September 1, 1983.

"A. December 10, 1979 - Johncamp Realty, Inc. liquidates Prudent Real Estate Trust and becomes a 55% owner of Prudent Netherland Properties Company and a 58.82% owner in Prudent Fleetwood Properties Company.

"B. December 30, 1980 -

"1. Johncamp Realty, Inc. acquires an additional 41.08% interest in Prudent Fleetwood Properties Company and a .1% interest on behalf of the Pacific Company.

"2. Compac [sic] Associates, a partnership owned 60% by Campeau Corporation and 40% by Nitrew Pacific Corporation, acquires Johncamp Realty's 99.9% interest in Prudent Fleetwood Properties Company and 55% interest in Prudent Fleetwood Properties Company.

"C. September 1, 1983 - Nitrew Pacific Corporation changes its name to Compac [sic] Associates, Inc. and acquires Campeau Corporation's 60% partnership interest in Campac Associates.

"2. Calculation of Original Purchase Price -

"The original purchase price attributable to Netherland Gardens and Fleetwood Park resulting from the above transactions is calculated as follows:

**PRUDENT NETHERLAND PROPERTIES COMPANY
CALCULATION OF ORIGINAL PURCHASE PRICE**

Purchase of Johncamp's 55% interest in Prudent Netherland Properties Company by Campac Associates on 12/30/80:

Cash		\$3,300,000
Debt assumed - per 11/30/80 tax return K-1	<u>1,560,280</u>	

Total purchase price paid for a 55% interest in Prudent Netherland Properties Company		\$4,860,280
---	--	--------------------

Purchase of Campeau's 60% interest in Campac Associates by Campac Associates, Inc. on 9/1/83:

Cash		\$ 300
Legal costs	4,336	
Debt assumed - (includes respective shares of Campac Associates debt and underlying debt in Prudent Netherland Properties Company)	<u>4,610,426</u>	

Total purchase price paid for a 60% interest in Campac Associates		\$4,615,062
---	--	--------------------

Total cost basis of the Netherland Garden Apartment Building at 9/1/83:

Cost basis of original 40% interest in Campac Associates plus improvements from 12/30/80 through 9/1/83 (4,860,280 x 40% + \$19,551)		\$1,963,663
Cost basis of 60% interest in Campac Associates acquired by Campac Associates, Inc. on 9/1/83 (determined above)		4,615,062
Limited partners' 45% interest in the unadjusted basis of the apartment building at 9/1/83	<u>1,940,937</u>	

Original Purchase Price of the Prudent Netherland

apartment building held by Prudent Netherland Properties Company at 9/1/83	\$8,519,662
---	-------------

Prudent Fleetwood Properties Company
Calculation of Original Purchase Price

Purchase of .1% interest in Prudent Fleetwood Properties Company by
The Pacific Company on 12/30/80:

Cash	\$ 2,922
Debt assumed - per 12/31/80 tax return K-1	<u>4,060</u>

Total purchase price paid for a .1% interest in Prudent Fleetwood Properties Company	\$ 6,982
---	---------------------

Purchase of Johncamp's 99.9% interest in Prudent
Fleetwood Properties Company by Campac Associates
partnership on 12/30/80:

Cash	4,998,000
Debt assumed-per 12/31/80 tax return K-1	<u>4,055,911</u>

Total purchase price paid for a 99.9% interest in Prudent Fleetwood Properties Company	9,053,911
---	----------------------

Purchase of Campeau's 60% interest in Campac Associates
by Campac Associates, Inc. on 9/1/83:

Cash	\$ 300
Legal costs	4,335
Debt assumed - (includes respective shares of debt in Campac Associates partnership and underlying debt in Prudent Fleetwood Properties Company partnership)	<u>7,721,166</u>

Total purchase price paid for a 60% interest in Campac Associates	\$7,725,801
--	------------------------

Total cost basis of the Fleetwood Park Apartment building
at 9/1/83:

Cost basis for The Pacific Company's .1% interest in Prudent Fleetwood Properties Company plus its respective share of improvements from 12/30/80 through 9/1/83 (6,982 + \$312)	\$ 7,294
Cost basis for 40% interest in Campac Associates plus improvements from 12/30/80 through 9/1/83 (\$9,053,911 x 40% + 124,774)	3,746,338
Cost basis for 60% interest in Campac Associates acquired by Campac Associates, Inc. on 9/1/83	<u>7,725,801</u>

Original Purchase Price of the Fleetwood Park apartment
building held by Prudent Fleetwood Properties Company

at 9/1/83

\$11,479,433"

By letter dated March 11, 1987 to Prudent, the Division informed Prudent that the Division's records indicated that, after the enactment of the gains tax law, a sale of a controlling interest in Prudent had occurred between Campeau Corporation and Campac Associates, Inc., and requested that Prudent provide information with regard to that transfer. The letter also requested transferee questionnaires for apartments sold, sales contracts for those sales, names of purchasers and further explanation of schedules previously submitted. The Division stated that a failure to provide this information would result in the issuance of notices of determination based only upon "available information".

By letter dated March 19, 1987, petitioner, by Paul L. Winther, requested an extension of time to provide the information requested. By letter dated May 7, 1987, Thomas Kearns, Esq., of Olshan, Grundman & Frome, informed the Division that his firm had been retained by Prudent "in connection with your letter dated March 11, 1987." By letter dated May 29, 1987, Mr. Kearns provided some of the documentation requested by the Division in its March 11, 1987 letter.

Mr. Kearns also made the following statement:

"We are attempting to contact the seller of the partnership interest referred to in the first paragraph of your letter [Campeau/Federated] to see what determination was made with respect to the gain [sic] tax on the transfer. It is our understanding that the contract was entered into before the effective date of the tax, and the transaction may therefore not fall under the gains tax law."

An internal Division memorandum dated November 16, 1987, authored by James P. Thomas, requested that Prudent be reaudited because of its claimed step-up in OPP based upon the claimed acquisition of a controlling interest in September 1983; its failure to file questionnaires on time; its allocation of OPP at two different rates without explanation; and problems with its change to "Option B".

Mr. Thomas noted that information regarding the transfer of the controlling interest had been requested but was never received. Mr. Thomas inferred from this that this transfer was never reported to the Division.

The record reflects no further contact between the Division and Mr. Kearns until July 18, 1990, when an auditor reported in her log that Mr. Kearns had called on that day and supplied the name and address of Campeau Corporation.

On July 25, 1990, Campeau Corporation called the auditor and stated that it would review its file concerning the sale of the controlling interest in September 1983.

Despite calls from the Division in the interim, Campeau Corporation did not respond to the Division until November 9, 1990, when it informed the Division that it had filed for bankruptcy on April 30, 1990, that the case had been settled and that it would forward information on the bankruptcy ruling. A log entry for November 9, 1990 made the first mention of potential transferee liability. Campeau Corporation never complied with numerous requests for information between November 9, 1990 and December 2, 1991.

After being informed that both the transferor and transferee were being held liable for potential gains tax due on the sale of the controlling interest from Campeau Corporation to Campac Associates, Inc. on September 1, 1983, Mr. Kearns sent the Division a copy of the agreement between Campeau Corporation and Campac Associates, Inc. That letter was dated May 10, 1991.

As mentioned above, Mr. Kearns wrote to the Division on June 7, 1991 and urged the State to file a claim against Campeau Corporation (now known as Federated) in its bankruptcy matter. However, the deadline for such claims had expired on August 1, 1990.

Finally, in response to the proposed audit adjustments sent to petitioner with regard to the transfer of the 60% interest in Campac Associates, Mr. Kearns sent a letter to the Division, dated July 29, 1991, in which he asserted that a transfer of a controlling interest in Prudent Netherland was not effectuated by the transfer of the interest in Campac Associates by Campeau Corporation. Further, Mr. Kearns asserted that the statute of limitations barred the Division's claim; that no liability should be enforced against the transferee until after the Federated (f/k/a Campeau Corporation) bankruptcy was completed; and that any amount not collected under a bankruptcy plan should not be collected from petitioner because of the Division's delay in

prosecuting its claim against Federated.

It is noted that petitioner has abandoned or otherwise resolved the issue with regard to the transfer of the partnership interest in Prudent Netherland. Also, petitioner has abandoned the issue of whether the assessment should be enforced against it before the Federated bankruptcy matter was completed. The issues were not raised by the parties in their briefs.

Petitioner filed a complaint against its attorneys, Kassel, Hoffman, Neuwirth & Geiger, in October of 1991, for failing to advise it of its obligation to file a transferee questionnaire, but the action was dismissed on motion of defendants as time barred. The decision of Judge Carmen Beauchamp Ciparik was issued on March 19, 1993.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposed a tax on gains derived from the transfer of real property at a rate of 10% of the gain. Transfer of real property is defined in the Tax Law as including the acquisition of a controlling interest in any entity with an interest in real property (Tax Law § 1440.7).

The transfer by Campeau Corporation of its 60% interest in Campac Associates (and therefore its interest in the Prudent real property) to Campac Associates, Inc. on September 1, 1983 was a transfer of real property subject to the real property gains tax (Tax Law §§ 1440.7; 1441).

At the time of the transfer, Tax Law § 1447 required that the transferor and transferee file forms prescribed by the Commissioner of Taxation and Finance, attested to under oath and affirmed as true under penalties of perjury (Tax Law § 1447 [former (1)]). The form to be filed by the transferee was to set forth the consideration paid to the transferor and the amount of any brokerage fees to be paid by him (Tax Law § 1447[1][c]). These forms were required to be filed 20 days prior to the date of transfer and, if the transferor or transferee failed to submit said information, any sums of money or other consideration which the transferee was required to transfer over to the transferor were subject to a first priority right for any taxes stated to be due in a tentative assessment (Tax Law § 1447[2], [3][a]). Further, Tax Law § 1447.3(a) stated that

a transferee was forbidden to transfer any sums of money to the transferor to the extent of the State's claim regardless of whether or not the transferor represented that he owed any tax and whether or not the transferee had knowledge that such taxes were owing and whether any such taxes were in fact owing.

The section also stated that, for failure to comply with the provisions stated, the transferee was personally liable for any taxes determined to be due from the transferor and that such liability may be enforced in the same manner as the liability for tax under Article 31-B.

Therefore, petitioner, as a transferee which failed to notify the Division of the September 1, 1983 transfer, failed to file a pre-transfer transferee questionnaire, and failed to pay the tax determined to be due on the transfer, is liable for the gains tax.

The Division issued its Notice of Determination on January 24, 1992, over eight years after the transaction in issue. Petitioner argues that the assessment is time barred by the provisions of Tax Law § 1444.3,¹ which provides that no assessment of additional tax shall be made after the expiration of three years from the date of transfer. However, the section also provides that if any required affidavit or questionnaire is not filed, the tax may be assessed at any time.

Petitioner concedes that the required questionnaire was never filed, but argues that the May 23, 1985 letter from Kenneth Leventhal & Company to a Division auditor outlining transactions which occurred in the acquisition of Netherland Gardens and Fleetwood Park apartment complexes for the purpose of determining how OPP was calculated was the "functional equivalent" of a transferee questionnaire for the Campeau Corporation to Campac Associates, Inc. transfer on September 1, 1983. However, the auditor was auditing a completely separate transaction, the focus of which was not the 1983 Campeau transfer, and it would be a stretch of the imagination to hold this letter as proper notice to the Division required by Tax Law § 1447. The September 1, 1983 transaction was not under audit and, when it was

¹Tax Law § 1444.3 was added by the Laws of 1984 (ch 900, eff September 4, 1984) but was deemed to be in full force and effect on and after March 28, 1983.

investigated, as noted below, the information sought by the Division was not provided.

Petitioner makes much of the March 11, 1987 letter from auditor James Thomas, once again in reference to the Prudent matter, in which Mr. Thomas specifically requested information about the transfer of the controlling interest by Campeau Corporation to petitioner. However, the record reveals that petitioner did not provide any of the requested information until May 29, 1987, when Mr. Kearns provided some information with regard to the Prudent transaction, but said he was trying to contact the seller of the partnership interest to see what determination was made with respect to the gains tax, i.e., he provided no information to the Division on the Campeau transfer to petitioner.

Although the Division decided to reaudit Prudent, as indicated in the Division's interoffice memorandum of November 16, 1987, there was no further discussion of the Campeau Corporation transaction reflected in the record until an entry in the auditor's log on July 18, 1990 in which Mr. Kearns is noted to have reported an address for Campeau. Petitioner does not contend that it supplied any more of the requested information in the period between May of 1987 and July of 1990.

The auditor's investigation of the Campeau transaction met with little success in discussions with Campeau Corporation. Although she began calling Campeau Corporation in July 1990, she received no information at all until November of 1990. At that time, she was told the company was in bankruptcy and that the case had already been settled. She continued to request records on the September 1983 transaction but received nothing between November 9, 1990 and December 2, 1991, despite numerous requests.

The auditor finally notified Campeau Corporation and petitioner they were both being held liable for tax. Petitioner immediately submitted a copy of the agreement between Campeau Corporation and petitioner regarding the 1983 transfer. That was provided by Mr. Kearns.

Petitioner argues that the Division should be estopped from enforcing the assessment issued to it because of the Division's undue delay in issuing the assessment. Petitioner cited

Matter of Moog, Inc. v. Tully (105 AD2d 982, 482 NYS2d 138) and Matter of Sachs New York v. Tully (79 AD2d 1056, 435 NYS2d 172) for the proposition that the doctrine of estoppel, although used sparingly against the government, is applicable against the State in a tax setting when it is necessary to prevent manifest injustice. It is determined that a manifest injustice did not occur herein. In fact, the record indicates that the Division met with little cooperation in its investigation of the September 1983 Campeau transaction. Petitioner's after-the-fact reliance upon the May 23, 1985 letter from Kenneth Leventhal & Company outlining the transaction and auditor James Thomas' letter of March 11, 1987 requesting more information on the transaction do not amount to the notice intended by Tax Law § 1447. The focus of the letter dated May 23 was the calculation of OPP for the Prudent cooperative units being sold, and which was not the primary inquiry of the Thomas letter. Further, petitioner never responded to the information requested in the Thomas letter with regard to the Campeau transaction, yet it wants to estop the Division because the Division raised the issue of the transaction and sought to complete its records. These are not the "exceptional facts" which require the application of the doctrine of estoppel to avoid manifest injustice as contemplated in Matter of Sheppard-Pollack, Inc. v. Tully (64 AD2d 296, 409 NYS2d 847).

Petitioner knew or should have known of its potential liability for the gains tax in September of 1983 because the statute specifically provides for imposition of tax on the transferee where the transferee fails to file the proper forms (Tax Law former § 1447.3). It has already been determined above that the Leventhal letter of May 23, 1985 did not constitute a transferee questionnaire or place the Division on notice of the September 1, 1983 transfer of a controlling interest to petitioner. Therefore, it is determined that the proper transferee filings were never made and the three-year statute of limitations set forth in Tax Law § 1444 was tolled, permitting the Division to assess tax at any time.

It is interesting that petitioner wishes to lay blame at every doorstep but its own for its own omission, i.e., failure to file a transferee questionnaire in 1983. The filing of said questionnaire would have insulated petitioner from liability. Instead, because of its omission, it

was forced to rely upon the equitable doctrine of estoppel, placing all hope of escaping liability on its improbable interpretation of the scarce facts in the record. Petitioner also claims that its counsel never advised it of its obligation to file, so it filed an unsuccessful lawsuit against them. However, that action was dismissed because it was not timely filed, a result also blamed on the Division for its "failure" to issue assessments in a timely manner. But the record just does not support such a conclusion.

The correspondence between the Division and petitioner during 1985 through 1987 was focused on the cooperative sales at Prudent and Netherlands. The March 11, 1987 Thomas letter seeking information on the transaction was answered by a letter from Mr. Kearns indicating that petitioner was still in the process of gathering information on the transaction. The November 16, 1987 interoffice memorandum indicated petitioner's unresponsiveness to the Division's requests for information and suggested a reaudit of Prudent. Since there is nothing in the record for the years 1988 or 1989, it can be assumed that the audit took place. Then, in 1990, the Division began an intensive investigation of the 1983 transfer, but received no information from either party (Campeau Corporation or petitioner) until May of 1991, long after the time for filing claims against Campeau (Federated) in Bankruptcy Court had expired.

In summary, these facts do not rise to that level of manifest injustice required to apply the doctrine of estoppel against the State (Matter of Sheppard-Pollack, Inc. v. Tully, *supra*). Therefore, the assessment was timely issued and the Division is not estopped from assessing or collecting the tax.

B. Petitioner asserts that it is not liable for penalty, interest penalty or interest as a transferee in the September 1, 1983 transaction because at that time only the transferor was liable to pay penalty and interest penalty. On this issue, the recent decision by the Tax Appeals Tribunal in Matter of Goldome Capital Investments (Tax Appeals Tribunal, May 16, 1991, *confirmed sub nom* Federal Deposit Ins. Corp. v. Commr. of Taxation and Fin., 189 AD2d 39, 594 NYS2d 447, *affd* 83 NY2d 44, 607 NYS2d 620) is dispositive. As noted by the Tribunal in that case, Tax Law § 1446(2) that was in effect in 1984 limits the imposition of penalty and

interest penalty to "any transferor". This section was amended by chapter 61 of the Laws of 1989, by substituting "person" for "transferor" in reference to liability for penalty and interest penalty. In Goldome, the Division stated that the amendment in question was a substantive change and not a clarification and, therefore, conceded that the transferee was not liable for penalty or interest penalty with regard to gains tax due on a 1983 transfer of real property. Therefore, all penalty and interest penalty imposed in the instant matter is cancelled.

The Laws of 1989 (ch 61) also changed Tax Law § 1446(1) regarding the payment of interest, substituting the word "person liable for the tax" for "transferor". Therefore, applying the rationale used in Goldome, the interest must also be cancelled, the rationale being that, at the time of the transfer when the tax was due, interest was not imposed on the transferee. The change in the law in 1989 extended liability to transferees as "persons liable for the tax", but the Goldome rationale supports a finding that interest, like penalty and interest penalty, should be cancelled.

C. The petition of Campac Associates, Inc. is granted to the extent set forth in Conclusion of Law "B", but is in all other respects denied, and the Notice of Determination, dated January 24, 1992 is sustained.

DATED: Troy, New York
May 5, 1994

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE